Usahatek Sdn Bhd v Asia Insurance (M) Bhd (Palaniappan a/l Sinnapan (trading under the name and style of Insure Training Centre, third party)

HIGH COURT (KUALA LUMPUR) — SUIT NO D3–22–2182 OF 2001
HANIPAH FARIKULLAH JC
30 JUNE 2010

Agency — Agent — Insurance agent — Whether agent acted in breach of agency agreement — Whether third party agent assumed liability in excess of RM500,000 without first obtaining defendant's written consent

Evidence — Parol evidence rule — Oral evidence — Oral evidence in direct conflict with terms of policy — Whether oral evidence ought to be admitted — Evidence Act 1950 s 92

Insurance — Burglary and housebreaking policy — Claim on policy for two burglaries — Whether defendant's liability limited to total of RM500,000 as stipulated in policy — Whether parties bound by conditions 8, 11 and 12 of policy — Whether plaintiff estopped from denying applicability of conditions of policy

The plaintiff, an operator of a bonded warehouse, had purchased a burglary and housebreaking policy ('the policy') from its agent one Palaniappan a/l Sinnapan ('the third party'). The policy, which was for the period from 26 August 1996 to 25 August 1997, covered the goods stored in the plaintiff's warehouse for the value of RM200,000 and the customs duty payable on the goods for the sum of RM260,000. When the policy was renewed for a further year, ie from the period from 26 August 1997 to 25 August 1998 ('the second policy'), the sum insured was increased to RM220,000 for the value of the goods and RM280,000 for the customs duty payable on the goods. Then again the policy was renewed for a further year, ie the period from 26 August 1998 to 25 August 1999 ('the third policy'), for the same sum insured as the second policy. On 21 December 1998, the plaintiff's warehouse was burgled and the goods were stolen. The plaintiff lodged a claim on the policy for the sum of RM416,296.21 ('the first claim') in respect of the stolen goods. While the plaintiff's claim was under review the plaintiff's warehouse was burgled for the second time on 20 January 1999. The plaintiff made a second claim on the policy for the sum of RM435,272.73 and the defendant's adjusters investigated the second loss as well. Upon completion of the investigations, the defendant paid the plaintiff the sum of RM379,893.36 on the first claim and

RM120,106.64 on the second claim, ie a total sum of RM500,000 for both claims. There was a difference of RM36,402.85 between the sum claimed by the plaintiff and the sum paid out by the defendant on the first claim and a difference of RM310,556.27 in the case of the second claim. Dissatisfied with the sums received from the defendant, the plaintiff instituted this action to recover the RM36,402.85 under the first claim and the RM310,556.27 under the second claim. The defendant contended that the policy was only limited to one single claim wherein the maximum sum insured was RM500,000 as stipulated in the policy schedule of the certificate of insurance read together with condition 8 of the policy jacket, which was annexed to the policy schedule. However the plaintiff submitted that it had not received the policy jacket containing condition 8 as referred to by the defendant. The plaintiff further averred that between the first and second loss they had enquired from their agent, the third party, as to whether they had to purchase a fresh policy or pay an additional sum to maintain their cover at RM500,000 and the latter had informed it that no additional payment was required to maintain the sum insured at RM500,000. The defendant instituted third party proceedings against the third party seeking an indemnity from him in the event the plaintiff succeeded in its claim against it. At the trial of this action the plaintiff's director testified that neither the defendant nor the third party had informed the plaintiff that once a claim had been made the policy expired and that the plaintiff would have to either purchase a new policy or reinstate the policy for the similar sum insured. The defendant's witnesses testified that it was the industry practice that the policy jacket and policy schedule would be delivered to the agent who then delivered it to the insured. The defendant's witness also testified that there had to be a reinstatement of loss clause in the policy in order for the sum insured to be reinstated after a claim had been paid out and that no such clause was applicable to the plaintiff's policy. Evidence was also adduced to show that there was no written request from the plaintiff as required under cl 12 of the conditions of the policy to have the policy reinstated. The third party alleged that an officer in the defendant's marketing department had said that it was not necessary to pay an additional premium or to take a new policy to maintain the insured sum of RM500,000 after the first burglary. The defendant denied the alleged verbal conversation and pleaded that it was not bound by the representations made by its agent as the agent third party had acted in excess of his authority.

Held, dismissing the plaintiff's claim with costs:

(1) On the totality of the evidence adduced, it was more likely that the policy jacket was attached to the policy schedule. The defendant's three witnesses confirmed that it was the industry practice that the policy jacket must be attached to the policy schedule and there was no reason to doubt them. The plaintiff's claim that it had not received the policy jacket was most likely an afterthought since the plaintiff's director had

through his solicitor made reference to condition 14 from the said policy jacket. The parties were thus bound by conditions 8, 11 and 12 of the policy jacket and the plaintiff was estopped from denying the applicability of conditions 8, 11 and 12 of the policy jacket (see paras 47–49 & 76).

(2) In the instant case, the credibility of the third party as a witness of truth was cast in doubt. The third party was not able to prove that he had spoken with an officer in the defendant company or for that matter if such an officer existed. In fact, an adverse inference could be invoked against the third party for not even attempting to locate or call the said officer whom the third party had allegedly spoken to (see paras 50–52).

(3) In the present case, the third party had acted in breach of the agency agreement by, inter alia, representing to the plaintiff that it would not need to pay any additional premium or buy any additional policy to maintain its sum insured at RM500,000. By so doing, the third party had assumed an obligation on behalf of the defendant for liability in excess of RM500,000 without first obtaining the defendant's written consent. It was also clear from the fact that the third party agent breached cll 9, 10 and 20 of the agency agreement that he did not conduct his business to promote and enhance the defendant's reputation (see para 53).

(4) The oral evidence of the plaintiff's director and the third party was in direct conflict with the terms of the policy jacket and ought not to be accepted. Further by seeking to adduce evidence of an alleged verbal conversation between the third party and an officer of the defendant to prove that the policy cover was RM500,000 per incident, the plaintiff had fallen foul of the rule against parol evidence and s 92 of the Evidence Act 1950 (see paras 64 & 67–68).

(5) There was no ambiguity in the wording of condition 8 of the policy jacket which provided that the defendant's maximum liability to the plaintiff under the policy was RM500,000 in total and any claim paid out reduced the amount of cover until the sum of RM500,000 was exhausted. Even if there was any request to renew the policy or pay additional premium to increase the defendant's liability to more than RM500,000 for each claim, such request was not reduced in writing. Thus the defendant's total liability to the plaintiff was limited to a total claim of RM500,000 (see paras 57–59, 63 & 71–72).

[Bahasa Malaysia summary

Plaintif, operator gudang dalam bon, telah membeli polisi kecurian dan pecah rumah ('polisi tersebut') daripada ejennya, Palaniappan a/l Sinnapan ('pihak ketiga'). Polisi tersebut, bagi tempoh 26 Ogos 1996 hingga 25 Ogos 1997, melindungi barangan yang disimpan dalam gudang plaintif untuk nilai

RM200,000 dan duti kastam yang perlu dibayar ke atas barangan itu berjumlah RM26,000. Apabila polisi tersebut diperbaharui untuk tahun selanjutnya, iaitu dari tempoh 27 Ogos 1997 hingga 25 Ogos 1998 ('polisi kedua'), jumlah yang diinsuranskan telah ditambah kepada RM220,000 untuk nilai barangan itu dan RM280,000 untuk duti kastam yang perlu dibayar ke atas barangan tersebut. Selepas itu polisi tersebut telah diperbaharui untuk tahun seterusnya, iaitu bagi tempoh 26 Ogos 1998 hingga 25 Ogos 1999 ('polisi ketiga'), untuk jumlah diinsuranskan yang sama seperti polisi kedua. Pada 21 Disember 1998, gudang plaintif telah dirompak dan barangan tersebut telah dicuri. Plaintif telah membuat tuntutan ke atas polisi tersebut untuk jumlah RM416,296.21 ('tuntutan pertama') berhubung barangan yang dicuri tersebut. Semasa tuntutan plaintif masih dikaji gudang plaintif telah dirompak untuk kali kedua pada 20 Januari 1999. Plaintif telah membuat tuntutan kedua ke atas polisi tersebut untuk jumlah RM435,272.73 dan pelaras-pelaras defendan telah membuat siasatan terhadap kerugian kedua juga. Setelah siasatan-siasatan selesai, defendan telah membayar plaintif sejumlah RM379,893.36 untuk tuntutan pertama dan RM120,106.64 untuk tuntutan kedua, iaitu jumlah keseluruhan RM500,000 untuk kedua-dua tuntutan. Terdapat perbezaan sejumlah RM36,402.85 antara jumlah yang dituntut oleh plaintif dan jumlah yang telah dibayar oleh defendan untuk tuntutan pertama dan perbezaan sejumlah RM310,556.27 untuk tuntutan kedua. Defendan berhujah bahawa polisi tersebut hanya terhad untuk satu tuntutan yang mana jumlah maksimum yang diinsuranskan adalah RM500,000 seperti yang ditetapkan dalam jadual sijil insurans polisi tersebut dibaca bersama syarat 8 kepada polisi keselamatan tersebut, yang dilampirkan kepada jadual polisi tersebut. Walau bagaimanapun plaintif berhujah bahawa ia tidak menerima polisi keselamatan yang mengandungi syarat 8 sepertimana yang dirujuk oleh defendan. Plaintif selanjutnya menegaskan bahawa antara kerugian pertama dan kedua mereka telah bertanyakan daripada ejen mereka, pihak ketiga, berhubung sama ada mereka perlu membeli polisi baru atau membayar jumlah tambahan untuk mengekalkan perlindungan mereka pada harga RM500,000 dan pihak ketiga telah memberitahu tidak ada bayaran tambahan diperlukan untuk mengekalkan jumlah diinsuranskan pada harga RM500,000. Defendan telah memulakan prosiding pihak ketiga terhadap pihak ketiga memohon ganti rugi daripadanya sekiranya plaintif berjaya dalam tuntutannya terhadapnya. Di perbicaraan tindakan ini pengarah plaintif telah memberi keterangan bahawa defendan mahupun pihak ketiga tidak memberitahu plaintif bahawa setelah tuntutan dibuat polisi tersebut tamat tempohnya dan bahawa plaintif perlu membeli polisi baru atau menghidupkan semula polisi tersebut untuk jumlah sama yang diinsuranskan. Saksi-saksi defendan telah memberi keterangan bahawa adalah amalan industri bahawa polisi keselamatan dan jadual polisi boleh diserahkan kepada ejen yang kemudian menyerahkannya kepada pengambil insurans. Saksi defendan juga memberi keterangan bahawa perlu ada kemasukan semula fasal kerugian dalam polisi bagi tujuan jumlah diinsuranskan dihidupkan semula setelah

tuntutan dibayar dan bahawa tiada fasal begini yang boleh terpakai untuk polisi plaintif. Keterangan juga telah dikemukakan untuk menunjukkan bahawa tiada permohonan bertulis daripada plaintif sepertimana dikehendaki di bawah fasal 12 kepada syarat-syarat polisi tersebut agar polisi tersebut dihidupkan semula. Pihak ketiga telah mengatakan bahawa pegawai di bahagian pemasaran defendan berkata tidak perlu membayar premium tambahan atau mengambil polisi baru untuk mengekalkan jumlah diinsuranskan sejumlah RM500,000 itu selepas rompakan pertama. Defendan telah menafikan perbualan lisan yang dikatakan itu dan memplid bahawa ia tidak terikat oleh representasi-representasi yang dibuat oleh ejennya kerana ejen pihak ketiga telah bertindak melebihi kuasanya.

Diputuskan, menolak permohonan plaintif dengan kos:

(1) Atas keseluruhan keterangan yang dikemukakan, ianya lebih berkemungkinan bahawa polisi keselamatan dilampirkan kepada jadual polisi tersebut. Ketiga-tiga saksi defendan mengesahkan bahawa ianya amalan industri di mana polisi keselamatan perlu dilampirkan kepada jadual polisi dan tidak ada sebab untuk meragukannya. Tuntutan plaintif bahawa ia tidak menerima polisi keselamatan itu kemungkinan besar sesuatu yang difikirkan kemudian memandangkan pengarah plaintif melalui peguamnya telah membuat rujukan kepada syarat 14 daripada polisi keselamatan tersebut. Oleh demikian pihak-pihak terikat dengan syarat-syarat 8, 11 dan 12 kepada polisi keselamatan dan plaintif diestopkan daripada menafikan pemakaian syarat-syarat 8, 11 dan 12 kepada polisi keselamatan tersebut (lihat perenggan 47–49 & 76).

(2) Dalam kes ini, kebolehpercayaan pihak ketiga sebagai saksi menimbulkan keraguan. Pihak ketiga tidak dapat membuktikan bahawa dia telah bercakap dengan pegawai di syarikat defendan atau untuk perkara itu jika pegawai tersebut wujud. Bahkan inferens bertentangan boleh digunakan terhadap pihak ketiga kerana tidak langsung mencuba untuk mencari atau memanggil pegawai tersebut yang mana pihak ketiga dikatakan telah bercakap (lihat perenggan 50–52).

(3) Dalam kes ini, pihak ketiga telah bertindak dalam pelanggaran perjanjian agensi dengan, antara lain, mengatakan kepada plaintif bahawa ia tidak perlu membayar apa-apa premium tambahan atau membeli apa-apa polisi tambahan untuk mengekalkan jumlah yang diinsuranskannya sejumlah RM500,000 itu. Dengan berbuat demikian, pihak ketiga telah memikul tanggungjawab bagi pihak defendan untuk lebihan liabiliti RM500,000 tanpa terlebih dahulu memperoleh persetujuan bertulis defendan. Adalah jelas berdasarkan fakta bahawa ejen pihak ketiga telah melanggar fasal-fasal 9, 10 dan 20

perjanjian agensi yang dia tidak menjalankan perniagaannya untuk memasarkan dan mempertingkatkan reputasi defendan (lihat perenggan 53).

(4) Keterangan lisan pengarah plaintif dan pihak ketiga mempunyai konflik secara langsung dengan syarat-syarat polisi keselamatan dan tidak patut diterima. Selanjutnya dengan memohon agar dikemukakan keterangan berhubung percakapan lisan yang dikatakan antara pihak ketiga dan pegawai defendan untuk membuktikan bahawa polisi keselamatan adalah RM500,000 untuk satu kejadian, plaintif telah gagal mematuhi peraturan terhadap keterangan parol dan s 92 Akta Keterangan 1950 (lihat perenggan 64 & 67–68).

(5) Tiada ketaksaan dalam susunan kata-kata syarat 8 kepada polisi keselamatan yang memperuntukkan bahawa liabiliti maksimum kepada plaintif di bawah polisi tersebut adalah RM500,000 secara keseluruhan dan apa-apa tuntutan yang dibayar telah mengurangkan jumlah perlindungan sehingga jumlah RM500,000 habis digunakan. Meskipun terdapat apa-apa permohonan untuk memperbaharui polisi tersebut atau membayar premium tambahan bagi meningkatkan liabiliti defendan melebihi RM500,000 untuk setiap tuntutan, permohonan sebegini tidak dibuat secara bertulis. Oleh itu jumlah liabiliti defendan terhadap plaintif terhad kepada jumlah tuntutan RM500,000 (lihat perenggan 57–59, 63 & 71–72).]

Notes

For cases on agent in general, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 895–902.

For cases on insurance in general, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1–385.

For cases on oral evidence, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2054–2062.

Cases referred to

Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1982] QB 84, QBD (folld)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Chiew Swee Chai v British American Insurance Co (M) Sdn Bhd [1987] 1 MLJ 53; [1986] CLJ (Rep) 316, HC (refd)

Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627; [1996] 4 CLJ 1, CA (refd)

Koh Siak Poh v Perkayuan OKS Sdn Bhd [1986] 1 MLJ 238; [1985] CLJ (Rep) 506 ; [1985] 1 CLJ 174, HC (folld)

Samaworld Asia Sdn Bhd & Anor v RHB Bank Bhd [2008] 6 CLJ 44, CA (refd)

A *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229; [1979] 1 LNS 119, FC (folld)
Utama Merchant Bank Bhd v Dato' Mohd Nadzmi bin Mohd Salleh [2001] 5 MLJ 317; [2001] 2 AMR 1687, HC (refd)

B **Legislation referred to**
Evidence Act 1950 s 92

J Clemons (J Clemons & Associates) for the plaintiff.
S Chrishantini (Murali B Pillai & Assoc) for the defendant.
Govin T Durai (Govin T Durai & Co) for the third party.

C

Hanipah Farikullah JC:

BACKGROUND FACTS

D

[1] The plaintiff, an operator of a bonded warehouse, obtained a burglary and housebreaking policy from the defendant for a period of one year from 26 August 1996 until 25 June 1997. The policy granted cover for the goods stored in the plaintiff's warehouse. The sum covered was RM200,000 for the value of the goods and RM260,000 for the customs duty payable on the goods.

E

[2] On 25 June 1997, the policy was renewed for a further year and the sum insured was increased to RM22,000 for the value of the goods and RM280,000 for the customs duty payable on the goods.

F

[3] On 25 June 1998, the policy was renewed for a further year. For the 1998 renewal, the plaintiff paid a premium of RM5,252.

[4] It is not disputed that on 21 December 1998, the plaintiff's warehouse G was burgled and goods were stolen. The plaintiff lodged a claim on the policy for the sum of RM416,296.21 comprising RM162,395.99 for the value of the goods lost and RM253,900.22 for the customs duties payable.

[5] The defendant appointed adjusters to investigate and assess the claim. H While the adjusters were still reviewing the plaintiff's claim, the plaintiff experienced a second burglary on 20 January 1999.

[6] The plaintiff made a second claim of RM435,272.73 comprising I RM150,662.91 being value of goods lost and RM284,609.82 being customs payable on the goods. The defendant's adjusters investigated the second loss as well.

[7] The defendant admitted liability but paid only RM120,106.64 in full settlement of the claim in respect of the burglary on 20 January 1999 and gave the reason to the effect that the policy was not endorsed with the 'Reinstatement of Loss Clause', the amount insured and covered was reduced by the amount that was paid for the burglary on 21 December 1998.

[8] On the advice of their adjusters the defendant paid the plaintiff a sum of RM379,893.36 comprising RM154,177.99 for the value of the goods lost and RM225,715.37 for the customs duty payable on the first loss. There was a difference of RM36,402.85 between the sum claimed by the plaintiff and the sum paid out by the defendant. On the second loss, the defendant paid a sum of RM120,106.64 comprising RM65,822.01 for the value of goods and RM54,284.63 for the customs payable. This was RM310,556.27 less than the sum claimed by the plaintiff for the second loss. In total the defendant paid the plaintiff the sum of RM500,000 for both claims. The plaintiff was not satisfied with the sums received by them and instituted this action to recover RM36,402.85 under the first loss and RM310,556.27 under the second loss. In its statement of claim the defendant is claiming a total amount of RM346,959.12.

[9] The defendant contended that the said policy of insurance is only limited to one single claim where in the maximum sum insured is RM500,000 as stated in the certificate of insurance (policy schedule) (pp 23–26 of bundle 'C'). The defendant averred that there is no 'Reinstatement of Loss Clause' endorsed on the said policy and therefore the plaintiff's claim is only limited to RM500,000 sum insured.

[10] The defendant also contended that a policy jacket containing the burglary and housebreaking policy was annexed to the policy schedule and are particularly referring to cl 8 of the said policy and which the defendant is contending was forwarded to the plaintiff through the third party who is the agent of the defendant.

[11] On the other hand, the plaintiff claimed that they only received the policy schedule and denied receiving the policy jacket containing, inter alia, condition 8.

[12] In addition, the plaintiff averred that between the first and the second loss, they asked their agent (the third party) whether they had to purchase a fresh policy or pay an additional sum to maintain their cover at RM500,000. The plaintiff claimed that the third party informed them that he had checked with a marketing officer of the defendant and had been told that no additional

payment was required to maintain the sum insured at RM500,000.

THIIRD PARTY CLAIMS

[13] The defendant had also instituted third party proceedings against the third party herein seeking an indemnity from him in the event the plaintiff succeeds in their claim against the defendant. It is not disputed that the defendant and the third party entered into an agency agreement dated 28 March 1996.

[14] The defendant argues that the plaintiff received the policy jacket together with the schedule and denies the contention that the third party had a conversation with any officer of the defendant between the two burglaries in respect of the value of the policy after the first burglary.

ISSUES

[15] From the facts set out, the main issues requiring consideration are as follows:

(a) Whether the policy jacket, containing the burglary and housebreaking policy was annexed to the policy schedule;

(b) Whether the insurance policy was endorsed with the 'Reinstatement of Loss Clause' and therefore the liability of the defendant is limited to a total amount of RM500,000; and

(c) Whether the plaintiff is estopped from disputing the validity of the clauses of the policy jacket.

THE PLAINTIFF'S CASE

[16] The case for the plaintiff is as follows. The plaintiff called one witness to give evidence. He was Dato Subrayan a/l Sellappan, the director of the plaintiff ('DW1'). This witness confirmed that the plaintiff purchased insurance policies from Palaniappan a/l Sinnappan (the third party) who is the agent of the plaintiff. He explained that the particulars of the three insurance policies are as follows:

(a) First policy is from 26 August 1996 to 25 August 1997

RM200,000 for goods

RM260,000 for customs duties.

(b) Second Policy is from 26 August 1997 to 25 August 1998

RM220,000 for goods

RM280,000 for customs duties.

(c) Third policy is from 26 August 1998 to 25 August 1999

RM220,000 for goods

RM280,000 for customs duties.

[17] PW1 testified that when he purchased the first policy for the duration of 26 August 1996 to 25 August 1997, he received the insurance policy from his agent the third party. According to him, the policy schedule was forwarded to him personally in an envelope and the third party informed him that it contain the policy insured.

[18] In examination-in-chief, a specimen of the policy jacket was shown to PW1 and he confirmed that the defendant or the third party never furnished him with the policy jacket and he was never informed by the defendant or the third party that the policy schedule will be attached with the policy jacket.

[19] When the policy schedule was shown to PW1 during cross-examination, he agreed that the policy schedule is an annexure of another document. He also confirmed that there may be some documents attached to the policy schedule.

[20] With regards to the renewal of the policy, PW1 confirmed that no renewal notice was sent to him by the defendant before the expiration of the first policy. However, PW1 said he was informed by the third party that the renewal was automatic.

[21] PW1 further stated that when the policy was renewed for the second and the third time, the third party furnished him with a new policy without the policy jacket.

[22] PW1 testified that the defendant or the third party never informed him that once a claim has been made, the policy expires and the plaintiff would have to either purchase a new policy or to reinstate the same policy for the similar sum insured.

[23] According to PW1, after the occurrence of the first burglary on 21 December 1998, he immediately informed the third party about the loss. He further stated that he had also inquired from the third party as to whether he needed to purchase a new policy or to continue with the same policy and pay additional premium for the same sum insured. PW1 said that subsequently the third party told him that he had inquired from an officer of the defendant in the marketing department who said that there was no need to renew the policy

or pay any additional premium. Therefore he was led to believe that the policy still had cover for the remaining period of his insurance (ie from 22 December 1998 until 25 August 1999 at the same sum of RM500,000).

[24] PW1 in cross-examination agreed that upon his instruction, his solicitor vides a letter dated 7 June 2001 wrote to the defendant that the plaintiff wishes to arbitrate the dispute pursuant to cl 14 of the policy. PW1 confirmed that article 14 referred to in the said letter is para 14 in the specimen policy jacket (refer to p 16 of bundle 'D').

[25] In cross-examination reference was made to condition 8 of the specimen policy jacket and PW1 confirmed that condition 8 means that regardless of how many claims the plaintiff made, the defendant is liable to pay a combined total of RM500,000 only.

[26] In cross-examination condition 12 of the specimen policy jacket was also shown to PW1 and he agreed that if the policy jacket was received by him, condition 12 of the policy was not satisfied by the plaintiff. He confirmed that he did not make the request to the third party whether an additional sum was required to be paid to maintain the policy at RM500,000.

THE DEFENDANT'S CASE

[27] The defendant called four witnesses. The first was Mohamad Azree bin Abdullah, a branch manager with the defendant ('DW1') and in 1998 he held the position of senior executive officer in the marketing department. DW1 testified that it is the industry practice that policy jacket with the policy schedule will be delivered to the agent who then delivers it to the insured. According to him the only exception to this is if it is direct business ie the insured approaches the defendant personally. In such a case the documents are posted to the insured. In this case, PW1 said that the plaintiff was represented by an agent (the third party). Therefore according to him policy documents would have been given to the third party to be handed over to the insured (the plaintiff).

[28] DW1 confirmed in examination-in-chief that generally, the policy jacket is only given at the inception of the policy. On subsequent renewals, only the renewal certificate bearing the schedule is given. A fresh policy jacket will be issued only when the terms of the policy are changed. Otherwise, the original policy term applies. PW1 further stated that the plaintiff will have received the policy jacket through his agent when the policy was first incepted. In 1998, only the renewal certificate would have been issued.

[29] DW1 clarified that the defendant do not have the acknowledgement receipt of the policy jacket by the plaintiff because the documents were issued over ten years ago and since then, the defendant has changed name and premises and also because of the takeover of the defendant by Tokio Marine much of the documentation cannot be located. He explained that the defendant attempted to locate the defendant's acknowledgement records but could not find them. DW1 also said that sometimes there are no acknowledgements as the agents pick up several policies at a time and there may not be acknowledgements for individual policies.

[30] In cross-examination, DW1 explained that policy jacket are fixed documents with terms and conditions.

[31] The defendant's second witness is Lee Eng Chiat ('DW2') a former senior executive officer in the defendant's underwriting department who worked for the defendant for almost thirty (30) years from 1974–2008. To a question whether by looking at the policy schedule (pp 23–26 of bundle 'C') whether one can tell if a policy jacket has been issued, this is what DW2 said in evidence:

> Page 23 on the left hand side there is a renewal certificate chop. The policy number on the right ends at 9801. This is a renewal without any amendment meaning there is no policy jacket attached to the renewal certificate. If the number ends with 01 it means renewed. The previous year's policy the period should 26.8.1997 – 25.8.1998. Below the 9801 there is a policy number 9700. That is a fresh policy and a policy jacket should be attached to that. If it ends with 00 it is a fresh policy and a policy jacket must attach.

[32] DW2 confirmed in cross-examination by the third party that the policy jacket is issued the first time when a policy is taken. For subsequent renewal, the defendant will only issue if there is amendment to the policy. In this case, according to him there is no amendment to the policy.

[33] In cross-examination, DW2 said that she cannot remember when the policy jacket was given to the insurance agent (third party). However she reiterated that when the underwriting department prepares the policy and when the policy is ready they would attach a copy of the schedule to the policy jacket and then deliver it to the marketing department.

[34] When asked about the defendant's position on communication between agents and the defendant in respect of policies, DW1 explained that general rule is as stated in cl 20.1 of the agency agreement dated 28 March 1996

(p 7 of bundle 'C') ie that any request shall be sent by prepaid registered post. This means that communications between the third party and the defendant should be in writing.

[35] However DW1 clarified that there said here is an exception to this rule where prior to inception of a policy, the agent is allowed to contact the defendant by telephone for approval to accept a risk proposed that is above the allowed limits granted to the agent. This is provided for in note (1) to the second schedule (A) to the agency agreement (p 9 of bundle 'A'). He said once the policy is incepted and in all other circumstances, communication between the agent and the defendant should be in writing.

[36] DW1 further testified that all communications on reinstatement of the sum insured under the policy must be in writing so that the defendant can decide whether to approve the request and insert a reinstatement of loss clause in the policy. Such approval is not automatic. He said that in this case there was no communication between himself and the third party, whether verbally or in writing, in respect of reinstatement of the policy sum. PW1 also clarified that the marketing department is not authorised to approve a request for renewal of the policy sum as this is an underwriting matter.

[37] On the procedure for renewal of the policy, DW1 explained that the general practice is that the renewal notice is normally issued with regards to a policy that is about to expire, two months before expiry. Such notices are normally given to the agent to be handed to the insured. Upon receipt of the renewal notice by the agent, it is forwarded to the insured who then gives the instruction to the agent to either renew the policy on the same terms or increase the sum insured or include additional terms on the policy. Subsequently he said the agent submits the renewal notice to the defendant with the insured instructions to proceed with the renewal. All policies do not carry an automatic renewal clause. Exceptions are only given in regards to property which is mortgaged to a bank or finance company. To a question whether the defendant still have the documents on the plaintiff's document, DW1 clarified that in the process of takeover by Tokio Marine most of the documents of the plaintiff could not be found.

[38] In her examination-in-chief, DW2 explained that condition 8 of the policy means that regardless of the number of claims made by the plaintiff, the total amount payable to them cannot exceed the policy limit in the schedule and every claim paid out is deducted from the RM500,000 cover. As the policy limit was RM500,000 the combined limit of claim payable to the plaintiff is RM500,000.

[39] DW2 also reiterated that in order for the sum insured to be reinstated after a claim has been paid out, there would have to be a reinstatement of loss clause in the policy. Furthermore, even if there had been a reinstatement of loss clause in the policy, it would have been necessary for the plaintiff to reinstate the cover. This means that the plaintiff would have to pay a pro-rated amount calculated on a pro-rata basis from the date of such loss to the expiry of the current period of insurance. This was not done by the plaintiff. Further DW2 said such a request should be made in writing pursuant to cl 12 of the conditions of the policy. DW2 also confirmed that the defendant did not receive any such written request from the plaintiff or the third party.

[40] According to DW2, the defendant will only consider including the reinstatement of loss clause when the property to be insured is considered a low risk and the client has a good claim history with them. In this case, the plaintiff was only insured by the defendant for approximately two years prior to the losses claimed and they deal in high risk property ie liquor and cigarettes. Therefore according to her the defendant would not include such a term in their policy.

[41] The defendant's third witness is Tang Kum Thye ('DW3') who also confirmed that it is not possible for the plaintiff's policy to be automatically renewed. She said as a matter of practice defendant will invite renewal two months before the expiry. Renewal notice is printed out and sent to the marketing department before it is submitted to the agent. The agents are supposed to come back in writing on whether the insured wants to renew. The agent is supposed to get insured instructions.

[42] DW3 in examination-in-chief confirmed that there was no reinstatement of loss clause applicable to the plaintiff's policy. If there had been such a clause, it would have been endorsed on the schedule.

[43] In cross-examination, DW3 admitted that any verbal request for the plaintiff to renew or to increase the policy sum must be confirmed in writing.

EVALUATION OF THE EVIDENCE AND FINDINGS

[44] In coming to decision on the plaintiff's claim, I have carefully perused the evidence by all parties as well as the documents tendered and relied on by them. I have also considered the written submission and authorities submitted by counsels.

[45] The submission of the plaintiff may be summarised as follows:

(a) The policy jacket was not annexed to the schedule;

A (b) The defendant did not have any acknowledgements and records that the plaintiff or the third party had delivered the policy jacket to the plaintiff;

(c) The defendant had failed to disclose the material facts that the plaintiff would have to reinstate their loss to maintain the sum insured or alternatively to purchase a new policy of insurance to protect their goods; and

(d) The third party had misrepresented to the plaintiff that it was not necessary to pay a fresh premium or buy a new policy to maintain the policy at RM500,000.

[46] On the other hand, the defendant submitted as follows:

(a) The defendant's liability to the plaintiff is limited to a total of RM500,000 as stipulated in the policy schedule and in condition 8 of the policy;

(b) Parties are bound by condition 11 of the policy, which states that no alterations may be made to the terms of the policy and no endorsements will be held valid unless the same is signed by an official of the company;

(c) Parties are bound by Condition 12 of the policy which states that every notice or communication to be given or made by the insured shall be given or made to the company in writing and that no notice or communication otherwise given or made shall be recognised for any purpose whatsoever;

(d) By seeking to adduce evidence of an alleged verbal conversation between the third party and an officer of the defendant to prove that the policy cover is RM500,000 per incident, the plaintiff has fallen foul of the rule against parol evidence and s 92 of the Evidence Act 1950;

(e) Further and/or in the alternative, the plaintiff is stopped from disputing the validity of the clauses of the policy jacket due to their own conduct;

(f) In the event it is proved that the third party made the representations/advice and/or assurance pleaded in the statement of claim, the defendant is not bound by the representations/advice and/or assurance as the agent acted in excess of his authority.

Whether the policy jacket was annexed to the policy schedule

[47] Much has been made by the plaintiff and the third party of the alleged fact that the plaintiff did not receive the policy jacket and is therefore not bound by its terms. The plaintiff and the third party went to great lengths to state that the plaintiff could not have received the policy jacket and much emphasis was placed on the fact that the defendant could not produce proof of acknowledgement of receipt of the policy jacket.

[48] I have carefully considered the evidence of the plaintiff's witnesses and the evidence of the defendant's witnesses and finds on the totality of evidence adduced is more in support of there being the policy jacket was attached to the policy schedule.

[49] I find the evidence of the defendant witnesses as being truthful and straight forward in their answers. The evidence against there being no policy jacket attached to the schedule can be itemised as follows:

(a) DW1, DW2 and DW3 confirmed in cross-examination that it is the industry practice that the policy jacket must be attached to the policy schedule;

(b) Even though the defendant cannot submit acknowledgement receipt by the plaintiff of the policy, DW1 and DW2 explained that the documents cannot be located because it was issued ten years ago and since then, the defendant has changed name and premises. I find this to be believable and likely. In fact in 1999 the defendant was taken over by another company, 'Tokio Marine'. It is also significant to note that the plaintiff did not dispute the assertions by DW1 and DW2;

(c) PW1 agreed in cross-examination that the schedule to the policy would have some documents annexed to it;

(d) DW1 and DW2 also confirmed that it is the industry practice that the policy jacket with the schedule will be delivered to the agent who then delivers it to the insured;

(e) DW1 and DW2 confirmed that the policy jacket will be issued at the inception of the policy. DW2 also confirmed that on subsequent renewal only the renewal certificate bearing the schedule is given. A fresh policy jacket will be issued only when the terms of the policy has changed. Otherwise the original policy terms will apply;

(f) PW1 agreed in cross-examination that if the defendant had given the documents, the third party would have handed the policy schedule and the policy jacket to him;

(g) The plaintiff's solicitor's letter dated 21 May 2001 and 7 June 2001 were written upon the instruction of the plaintiff, make reference to condition 14 of the policy which is para 14 of the policy jacket. In cross-examination, PW1 agreed that the letter was written upon his instruction. Therefore the plaintiff is aware of condition 8 of the policy jacket;

(h) The plaintiff claimed not to have received the document containing condition 8 as their solicitor's letter dated 3 August 2001 is clearly an afterthought.

[50] With regards to the issue as to whether the third party had delivered the policy jacket with the schedule to the plaintiff, even though the third party was unable to confirm that he did, in the instant case I must say that as far as the credibility of the third party is concerned I am unable to accept him as a witness of truth for the following reasons:

(a) The third party's solicitor did not put to any of the defendant's witnesses that 'Mr Ho' from the marketing department was the person that spoke to the third party. Learned counsel for the third party did not even confirm with DW1, (the plaintiff's senior executive officer in the marketing department) whether there was a 'Mr Ho' in that department;

(b) The third party was not able to prove that a 'Mr Ho' worked with the defendant at the time of the alleged conversation, other than his evidence in court;

(c) The third party acted in a secretive manner in the conduct of his defence. This can be seen from the notes of the proceedings.

[51] Further the court agrees with learned counsel for the defendant's submission that since it is the third party who had alleged that 'Mr Ho' had said that it was not necessary to pay the additional premium or to take a new policy to maintain the insured sum of RM500,000 after the first burglary, it is thus incumbent upon the third party to call him. The court finds that no adverse inference can be invoked against the defendant for not calling 'Mr Ho' as DW1 had explained that there is no 'Mr Ho' who worked in the defendant's department. On the contrary, an adverse inference can be invoked against the third party for not even attempting to locate or call 'Mr Ho'. Learned counsel for the defendant cited the case of *Utama Merchant Bank Bhd v Dato' Mohd Nadzmi bin Mohd Salleh* [2001] 5 MLJ 317; [2001] 2 AMR 1687 in support of his contention.

[52] The High Court in the case of *Utama Merchant Bank Bhd v Dato' Mohd Nadzmi bin Mohd Salleh* also referred to the decision in the case of *Juahir bin*

Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627; [1996] 4 CLJ 1 where the Court of Appeal held as follows:

> He who alleges must prove such allegation and the onus is on the appellant to do so. See s 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Bashir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Bashir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered.

Whether the third party has breached the agency agreement

[53] It is clear from the evidence adduced that the third party acted in breach of the agency agreement. The relevant breaches are as follows:

(a) Clause 10.1.4. states that the agent may not assume any obligation on behalf of the company without its prior written consent;

(b) In the present case, the agent allegedly represented to the plaintiff that he would not need to pay any additional premium or buy an additional policy to maintain his sum insured at RM500,000. By doing so, he assumed an obligation on behalf of the defendant for liability in excess of RM500,000 without first obtaining their written consent;

(c) Clause 20.1 requires all notices of demands or requests required or permitted to be made under this agreement to be by prepaid registered post;

(d) By the third party's own admission, there was no communication in writing with the defendant in respect of the request on whether the plaintiff's policy may be maintained at a sum insured of RM500,000;

(e) The only provision in the agency agreement for verbal communication is at note (1) to the Table of Acceptance Limits agents (p 9 bundle C). Note (1) states 'In the event of proposal exceeding the above limits, you are to contact the Principal Officer, Kuala Lumpur or any of our branches by telephone for instructions before acceptance'. Note (1) only refers to acceptance of proposals ie before the policy is instituted. This note may not be used to confer authority on the third party to communicate verbally in respect of the amount of policy liability;

(f) When the third party was asked to show the court where in this agency agreement it says he could get verbal confirmation from the defendant or something as important as whether the defendant's policy liability is to a maximum of RM500,000 or RM500,000 for each loss, the third party admitted 'It's not there';

(g) Clause 9.1.12 of the agency agreement (p 4 bundle 'C') states that the agent should conduct his business within the ethics of the profession as

laid down by the Code of Practice at Appendix 1. Section B of Appendix 1 states that the agent shall explain the contract to the insured and draw their attention to any restrictions or exclusions applying to the policy;

(h) By the third party's own admission, he did not explain the details of the policy to the plaintiff or point out the restrictions or exclusions. He did not even check with the plaintiff if the policy documents they received were in order;

(i) Clause 9.1.1 of the agency agreement states that the agent shall at all times conduct his business and use his best endeavors to preserve and promote the interest and enhance the reputation of the company;

(j) It is clear from the fact that he breached cll 10.1.4, 20.1 and 9.1.12 that the third party did not conduct his business and used his best endeavor to preserve and promote the interest and enhance the reputation of the defendant.

Whether the insurance policy was endorsed with the 'Reinstatement of Loss Clause' and the liability of the defendant is limited to a total amount of RM500,000

[54] Having decided that the policy jacket was attached to the schedule which was delivered to the plaintiff by the third party, the next issue to be considered is whether the defendant's liability is limited to a total of RM500,000 as stipulated in the policy schedule read together with condition 8 of the policy jacket.

[55] In respect of this issue, the evidence of DW2 must be noted. She was the senior executive officer in the defendant's underwriting department. She worked in the underwriting department from 1974–2008.

[56] DW2 testified that in order for the sum insured to be reinstated after a claim has been paid out, there would have to be a reinstatement of loss clause in the policy. In this instance, there was none. Furthermore according to her even if there had been a reinstatement of loss clause in the policy, it would have been necessary for the plaintiff to instate the policy cover. This means that the plaintiff would have to pay a pro-rated amount calculated on a pro-rata basis from the date of such loss to the expiry of the current period of insurance. This was not done by the plaintiff. She confirmed that such a request should be made in writing pursuant to cl 12 of the conditions of the policy. According to DW2, the defendant did not receive any such written request from the plaintiff.

[57] The court notes that the policy schedule, inter alia, states as follows: A

> The total sum insured of all items in this risk is RM500,000.00.

[58] It is noted that condition 8 of the policy jacket states as follows: B

> All sums which may from time to time be paid by the way of compensation to the Insured under this Policy in any period of insurance shall be accounted in diminution of the total sum insured, so that in case of subsequent loss or damage during the same period, the total amount payable by the Company shall not in any case exceed the total sum insured. C

[59] The court finds that there is no ambiguity in the wordings of condition 8. It means that the defendant's maximum liability to the plaintiff under the policy is RM500,000 in total and any claim paid out reduces the amount of cover until the sum of RM500,000 is exhausted. D

[60] Condition 11 of the policy states:

> No alterations in the terms of this Policy and no endorsement will be held valid unless the same is signed by an official of the company. E

[61] Condition 12 of the policy states:

> Every notice or communication to be given or made by the Insured shall be given or made to the Company in writing. No notice or communication otherwise given or made shall be recognized for any purpose whatsoever. F

[62] In the case of *Chiew Swee Chai v British American Insurance Co (M) Sdn Bhd* [1987] 1 MLJ 53; [1986] CLJ (Rep) 316 (Tab 1), Shanker J (as he then was) stated that: G

> But where the words of the policy are crystal clear it is the view of the court that the sanctity of the contract should be upheld. H

[63] I am satisfied that based on the authority cited the parties are bound by conditions 8, 11 and 12 of the policy.

[64] I agree with learned counsel for the defendant's submission that the oral evidence of PW1 and the third party is in direct conflict with the terms of the policy jacket and ought not to be accepted. I

[65] In the case of *Samaworld Asia Sdn Bhd & Anor v RHB Bank Bhd* [2008] 6 CLJ 44 (Tab 4), the Court of Appeal stated as follows:

A The main issue before the trial judge was whether there was the oral collateral contract as alleged by the defendants, which is a question of fact. The learned trial judge found, at the conclusion of the trial that the defendants had failed to prove on a balance of probabilities the existence and the terms of the alleged oral collateral contract.

B

The defendants main ground of appeal before us is that the learned trial judge failed to properly evaluate all the oral evidence before him, preferring instead to rely purely on documents and to draw inferences there from. The defendants allege that the learned trial judge failed to properly test or examine the documents critically against the oral evidence in deciding there was no collateral contract.

C

The law views with suspicion collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract. Collateral contracts must be proved strictly. The terms of such contracts and the existence of a contrary intention on the part of all the parties must be clearly shown.

D

The parol evidence rule in s 92 of the Evidence Act 1950 provides that no evidence of any oral agreement shall be admitted for the purpose of contradicting any terms of a written agreement. Nevertheless, under proviso (b) thereof:

E

> the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document. (Emphasis added.)

F

In *Gek Lau Choon Theatrical Company v Hu Kiang Yan* [1937] MLJ 25; [1936] 1 LNS 16 at 24 Mc Elwaine CJ observed '... the more formal the written document is, the more suspicious the court must be as to the existence of a collateral contract, and if the contract is informal less suspicion attaches to the attempt to set up a collateral contract'. With respect, we endorse and accept the said observation of Mc Elwaine CJ and unhesitatingly adopt it as a principle applicable to the present appeal, a fortiori the evidence adduced before the trial court. The court must be circumspect and view with suspicion the defendants' attempt to set up the oral collateral contract, contrary to the formal loan documents executed with RMBB.

G

H

[66] The evidence of PW1 and the third party in cross-examination in fact show quite conclusively that there was no communication in writing in respect of the request for reinstatement of the policy. I am satisfied that based on the above said authorities cited, it is clear therefore, that any alleged verbal conversation is not binding on the defendant.

I

[67] The court further agreed with the defendant's counsel's submission that by seeking to adduce evidence of an alleged verbal conversation between the third party and an officer of the defendant to prove that the policy cover is

RM500,000 per incident, the plaintiff has fallen foul of the rule against parol evidence and s 92 of the Evidence Act 1950.

[68] There are whole list of authorities that support the inadmissibility of such evidence. It is trite law that documents must be construed within its four corners. This is the decision of the Federal Court in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229; [1979] 1 LNS 119, and the Supreme Court case of *Koh Siak Poh v Perkayuan OKS Sdn Bhd* [1986] 1 MLJ 238; [1985] CLJ (Rep) 506; [1985] 1 CLJ 174, where it was held that in a clear and unambiguous document the court should not go beyond any written terms. This court cannot admit these oral testimonies in the light of s 92 of the Evidence Act and the cases cited.

[69] In the present case, the plaintiff has not pleaded the existence of a collateral contract. Furthermore, the contract the plaintiff seeks to vary is a policy of insurance. The court notes that a contract of insurance has a high degree of formality as it governs the rights and obligations between the parties to the contract. It cannot be dismissed on the strength of some alleged oral representations especially when such oral representations directly contradict the terms of the formal contract.

[70] The court finds that one would have expected that such an important matter with grave consequences in terms of dollars and cents would have been reduced in writing. Even if the defendant has not reduced the renewal of the policy in writing, surely, it would have been in the interests of the plaintiff to take the necessary actions of writing to the defendant or to the third party for confirmation of the alleged renewal and the amount insured.

[71] Indeed if there is any request to renew the policy or pay additional premium to increase the defendant's liability to more than RM500,000 for each claims, such request was not reduced in writing by the plaintiff.

[72] Given the fact that the representations relied on by the plaintiff are in direct contradiction to conditions 8, 11 and 12 of the policy, particularly the requirements of notice/communication in writing and alteration to the terms of the policy having to be endorsed and signed by the officer of the defendant.

Whether the plaintiff is estopped from disputing and/or questioning the validity of the clauses of the policy jacket due to their own conduct

[73] The defendant contends that the plaintiff is estopped from denying the applicability of the terms of the policy jacket as they have referred to condition 14 of the policy jacket and held themselves to be bound by.

[74] In the case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 (Tab 5), the Federal Court stated as follows:

> The time has come for this court to recognise that the doctrine of estoppels is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.
>
> Edgar Joseph Jr J (as he then was) in an illuminating judgment in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1953.
>
> The doctrine may be applied to enlarge or to reduce the rights or obligations of a party under a contract: *Sarat Chunder Dey v Gopal Chunder Laha* LR 19 IA 203; *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84. It has operated to prevent a litigant from denying the validity of an otherwise invalid trust (see *Commissioner for Religious Affairs, Trengganu & Ors v Tengku Mariam binti Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222) or the validity of an option in a lease declared by statute to be invalid for want of registration (see *Taylor Fashions Ltd v Liverpool Victoria Trustees* [1981] 2 WLR 576). It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent (see *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387) and to create binding obligations where none previously existed (see *Spiro v Lintern* [1973] 1 WLR 1002. It may operate to bind parties as to the meaning or legal effect of a document or a clause in a contract which they have settled upon (see the *Amalgamated* case) or which one party to the contract has represented or encouraged the other to believe as the true legal effect or meaning: *The American Surety Co of New York v The Calgary Milling Co Ltd* (1919) ; 48 DLR 295; *De Tchihatchef v The Salerni Coupling Ltd* [1932] 1 Ch 330; *Taylor Fashions*.

[75] The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84 case (at p 122) as follows:

> The doctrine of estoppels is one of the most flexible and useful in the armory of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppels, estoppels by representation of fact, estoppels by acquiescence, and promissory estoppels. At the same time it has been sought to be limited by a series of maxims: estoppels is only a rule of evidence, estoppels cannot give rise to a cause of action, estoppels cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted

the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[76] In this case, the facts that give rise to the estoppels against the plaintiff are as follows:

(a) The plaintiff's solicitor's letters dated 21 May 2001 and 7 June 2001 both referring to article 14 of the policy and seeking the defendant's agreement to set the matter down for arbitration;

(b) Article 14 is a condition in the policy jacket along with conditions 8, 11 and 12;

(c) The plaintiff first denies receiving the document containing condition 8 by way of their solicitor's letter dated 3 August 2001;

(d) This denial is clearly an afterthought as the plaintiff's solicitors had been referring to article 14 of the policy jacket months before the denial was issued;

(e) It is therefore clear that the plaintiff's behavior was such that they had knowledge of and considered themselves bound by the terms of the policy jacket. They could not have known of article 14 otherwise;

(f) The plaintiff is therefore estopped from denying the applicability of conditions 8, 11 and 12 of the policy jacket.

CONCLUSION

Based on the totality of the evidence adduced and supported by the documentary evidence tendered, the court finds that on the balance of probabilities the plaintiff has failed in establishing its case against the defendant. Based on the evidence adduced the court finds that the policy jacket was attached to the policy schedule and therefore the plaintiff is bound by its terms particularly conditions 8, 11 and 12 of the policy. The court further finds that the letters from the plaintiff's solicitor dated 21 May 2001 and 7 June 2001 clearly shows that the plaintiff was aware of the policy terms and considered themselves bound by those terms. Therefore, the defendant's total liability is limited to a total claim of RM500,000. Accordingly, the plaintiff's claim is dismissed with costs. The costs of the third party proceedings should be

borne by the third party himself as the plaintiff's claim revolves around the representation of the third party (which representation the third party does not deny).

Plaintiff's claim dismissed with costs.

Reported by Kohila Nesan